431 U.S. 119, 129 (1977), the Court held that "the enactment of the new statute clearly moots the claims of the named Appellees. . . ." *See also Lewis v. Continental Bank Corp.*, 494 U.S. 472.

The circuits apply these mootness principles in civil First Amendment challenges. The present case is a civil lawsuit alleging that certain laws violate the First Amendment. The Eleventh Circuit held that because the laws were amended, the constitutional challenge became moot (since there was no evidence that the laws would later be reenacted). The Eleventh Circuit's conclusion is consistent with the general principles stated by this Court. Furthermore, the Eleventh Circuit's conclusion is consistent with every other circuit court to address the issue.

The Seventh Circuit has perhaps most clearly stated the rule: "we, along with all the circuits to address the issue, have interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar." *Federation of Advertising Industry Representatives v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003). The Eleventh Circuit has agreed:

> [O]ur view of the law as to voluntary cessation by governmental actors is altogether consonant with that of every other Federal Circuit to address the issue. The federal courts of appeal have virtually uniformly held that the repeal of a challenged ordinance will moot a plaintiff's request for injunctive relief in the absence of some

> evidence that the ordinance has been or is reasonably likely to be reenacted.

Coral Springs Street Systems v. City of Sunrise, 371 F.3d 1320, 1331 n.9 (11th Cir. 2004).

This principle has been followed by the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and District of Columbia circuits.[1] We are not aware of any contrary authority, and National Advertising has not cited to any.

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1. These are some of the cases in which the circuit courts have held that First Amendment challenges in civil cases are rendered moot by repeal or amendment of the law, unless there is evidence that the government intends to reenact the law: *D.H.L. Associates v. O'Gorman*, 199 F.3d 50 (1st Cir. 1999); *Lamar Advertising v. Town of Orchard Park*, 356 F.3d 365 (2nd Cir. 2004); *American Legion Post 7 v. City of Durham*, 239 F.3d 601 (4th Cir. 2001); *Reyes v. City of Lynchburg*, 300 F.3d 449 (4th Cir. 2002); *Brazos Valley Coalition for Life v. City of Bryan*, 421 F.3d 314 (5th Cir. 2005); *Kentucky Right to Life v. Terry*, 108 F.3d 637 (6th Cir. 1997); *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830 (6th Cir. 2004); *Knight Riders of Ku Klux Klan v City of Cincinnati*, 72 F.3d 43 (6th Cir. 1995); *Federation of Advertising Industry Representatives v. City of Chicago*, 326 F.3d 924 (7th Cir. 2003); *Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1997); *Sorano v. Clark County*, 345 F.3d 1117 (9th Cir. 2003); *Rich v. City of Ontario*, 10 Fed. Appx. 583 (9th Cir. 2001); *Seay Outdoor Advertising v. City of Mary Esther*, 397 F.3d 943 (11th Cir. 2005); *Coral Springs Street Systems v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004); *National Black Police Association v. District of Columbia*, 108 F.3d 346 (D.C. Cir. 1997). *Cf. National Advertising Co. v. City of Fort Lauderdale*, 934 F.2d 283 (11th Cir. 1991) (overbreadth challenge not moot where city might return to original law).

National Advertising's misreliance on criminal cases to establish conflict. So the law is clear, and unchallenged: a First Amendment attack on a licensing law in a civil case is mooted by the repeal or amendment of the law, at least where (as here) there is no evidence that the government intends to reenact the law. Each of the cases which we have cited in the margin have so held. National Advertising claims that these unanimous holdings are in conflict with precedent of this Court. There is no such conflict.

National Advertising relies on two of this Court's precedents to establish conflict. *Massachusetts v. Oakes*, 491 U.S. 576 (1989); *Ohio v. Osbourne*, 495 U.S. 103 (1990). Each of these cases is fundamentally different from this case, however, as those cases involved *criminal prosecutions*.

There are two opinions in *Massachusetts v. Oakes*, which involved a criminal conviction for obscenity. The plurality opinion holds—contrary to National Advertising's position here—that because the law under which the defendant had been convicted had been repealed, the First Amendment challenge to that law had become moot. Justice Scalia's opinion, joined in part by Justices Blackman, Brennan, Marshall, and Stevens, held that the overbreadth defense was still available, but the opinion clearly focuses on the criminal nature of the proceedings:

> I do not agree with Justice O'CONNOR's conclusion that the overbreadth defense is unavailable when the statute alleged to run afoul of that doctrine has been amended to eliminate the basis for the overbreadth challenge. It seems to me strange judicial theory that a conviction initially invalid can be resuscitated by

> postconviction alteration of the statute under which it was obtained. Indeed, I would even think it strange judicial theory that an act which is lawful when committed (because the statute that proscribes it is overbroad) can become retroactively unlawful if the statute is amended *preindictment*.

Massachusetts v. Oakes, 491 U.S. at 585-86 (emphasis in original). *Ohio v. Osborne* followed *Massachusetts v. Oakes*, and similarly involved a criminal prosecution for obscenity.

National Advertising's argument for conflict is based upon its assertion that this Court's opinions on the mootness of First Amendment arguments in *criminal* cases conflict with the circuit court consensus on mootness of First Amendment arguments in *civil* cases. *See* Petition for Writ of Certiorari, at 17-18. But there are crucial differences between criminal cases and civil cases. If a person has been convicted of a statute which he or she claims is unconstitutional, then the person has the right to argue that the statute was unconstitutional when enacted and when the person committed the allegedly illegal act. This is true even if the statute is later amended to cure the constitutional infirmities. *See Kraimer v. City of Schofield*, 342 F. Supp. 2d 807, 819 (W.D. Wisc. 2004) ("As *Oakes* demonstrates, the circumstances in a criminal case are so different from those in a civil case that it would be difficult to extrapolate a rule from it that would apply to cases such as plaintiff's.").

We acknowledge that National Advertising raises some interesting points about *Massachusetts v. Oakes*. Perhaps in some future case the Court should clarify the mootness doctrine and repealed/amended laws in criminal cases

(if *Ohio v. Osborne* did not do this adequately). But this civil case is obviously not the proper vehicle for consideration of the standard in criminal cases. On the question of mootness and repealed/amended laws in civil cases, the law in the circuits is unanimous, and does not conflict with any decisions of this Court. There is no conflict, and no reason for the Court to grant the writ.

II.

The circuit court, which found the Plaintiff's claims to be moot, did not decide—much less create conflict on—the issue of the standing of those with commercial interests to raise the noncommercial speech interests of third parties

National Advertising also argues that the decision of the circuit court conflicts with other decisions on the issue of third-party standing to raise First Amendment arguments. It states this most clearly in the first and last sentences of its argument on this point: "Parties with a commercial interest in speech may raise a facial challenge to an ordinance and raise the noncommercial speech interests of third parties." (Petition, at 24). "[T]his Court should . . . clarify that overbreadth standing allows an outdoor advertising company with a commercial interest in speech to assert the noncommercial speech interests of third parties in a facial challenge to an ordinance that impinges upon First Amendment rights." (Petition, at 28).

There are many reason why this Court should not grant the writ on this issue.

First, the circuit court never addressed the issue that National Advertising claims creates conflict. The decision of the circuit court nowhere states that a party with a commercial interest in speech may (or may not) raise a facial challenge to an ordinance and raise the noncommercial interests of third parties. The district court addressed the issue, *National Advertising Co. v. City of Miami*, 287 F. Supp. 2d 1349, 1359 (S.D. Fla. 2003), but the circuit court did not. There is thus no conflict.

Second, there is a good reason why the circuit court did not address the issue in this case: the issue is entirely moot, in light of the City's change in its zoning provisions. Since the City's law has changed, the case is moot, and neither the circuit court nor this Court need to address questions involving third-party standing.

Third, there is imprecision in National Advertising's framing of the issue which it asks the Court to review. We have quoted the first and last sentences of its argument on this point, which focus on its standing to assert the noncommercial speech interests of third parties. But its Reason for Granting the Writ and Question Presented vaguely point in a somewhat different direction, and do not address the commercial/noncommercial standing issue. *See* Petition, at i ("Does an owner of outdoor signs have standing to attack on First Amendment grounds parts of an ordinance that have not been applied to it where those provisions are inextricably intertwined with other provisions of the ordinance that were applied to require removal of the owner's signs?"); Petition, at 24 ("The Decision Conflicts with Decisions of this Court and Other Courts of Appeals Regarding Standing to Challenge and Entire Ordinance Due to Inextricably Intertwined Constitutional Defects."). If the Court were to

grant review of this point, it is unclear what it would in fact be agreeing to consider.

Fourth, National Advertising's main complaint concerns intra-circuit conflict. It claims that the Eleventh Circuit's decision in this case is in conflict with its own prior decisions, and with decisions of other circuits. It refers to "disunity in the Eleventh Circuit's jurisprudence" on this issue. (Petition, at 26). If indeed there is such disunity, then the better course is to assume that the Eleventh Circuit, when presented with the appropriate case, will address the disunity, and definitively resolve the question. Indeed, the Eleventh Circuit is currently considering the third-party standing issue *en banc*, in a case where it is squarely presented. *See Tanner Advertising Group v. Fayette County*, 411 F.3d 1272, *rehearing en banc granted*, 429 F.3d 1012 (11th Cir. 2005). Where the main complaint is intra-circuit conflict, there is no reason for this Court to become involved. *See generally Davis v. United States*, 417 U.S. 333, 340 (1974). There is certainly no reason for this Court to become involved in a case where (1) the First Amendment challenge is moot, and (2) the circuit court did not address the issue. There is no reason to grant the writ.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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